

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
219 South Dearborn Street
Chicago, Illinois 60604

October 11, 2017

STATEMENT ON CONFIDENTIALITY OF COURT MATERIALS

All members of the legal profession are familiar with the responsibility to keep certain matters confidential. Model Rule 1.6 of the American Bar Association's Rules of Professional Conduct, which have been adopted in each of the three states of the Seventh Circuit, governs the duty to maintain confidences of a current client; Rule 1.18 addresses prospective clients; and Rule 1.9(c)(2) covers prior representations. See Model Rules of Prof'l Conduct (Am. Bar Ass'n 2016); ILCS S. Ct. Rules of Prof. Conduct (2017); 34 Ind. Admin. Code (West 2017); Wis. Stat. Ann. SCR 20 (West 2017). Although the courts in the Seventh Circuit are committed to providing an explanation, in the form of an opinion or order, for all of their decisions, that does not mean that all materials within the court are open to the public. To the contrary, just as the Executive Branch enjoys a deliberative-process privilege, the Judiciary requires comparable rules to assure confidentiality of the internal deliberations among judges that occur before a decision is issued. These rules are especially important for any multi-member panel, whether the *en banc* court of appeals, a normal panel of three judges, or a statutory three-judge court, see 28 U.S.C. § 2284.

Both judges and non-judicial employees of the Judiciary have this duty. For the latter, it is reflected in Canon 3D of the Code of Conduct for Judicial Employees, which provides in relevant part as follows:

A judicial employee should never disclose any confidential information received in the course of official duties except as required in the performance of such duties, nor should a judicial employee employ such information for personal gain. A former judicial employee should observe the same restrictions on disclosure of confidential information that apply to a current judicial employee, except as modified by the appointing authority.

Although the Code of Conduct for United States Judges is written in less direct terms, it too prohibits the disclosure of internal, deliberative materials. Because of its greater generality, however, Chief Judge Diane P. Wood of the Seventh Circuit asked the Judicial Conference's Committee on Codes of Conduct to clarify the scope of a judge's duty. The Committee responded on August 7, 2017. It ended its response by noting that, "[a]s the recipient of this letter, you may use it as you please."

Had Chief Judge Wood wished to keep the letter confidential, she could have done so. The Committee provides confidential ethics advice to judges and judicial employees upon request, and does not make the response public but leaves it to the discretion of the recipient to use the advice as he or she deems appropriate. This letter, however, is of general importance and interest, not only to the members of the judiciary in the Seventh Circuit but also to the public at large. It helps to explain what is, and what is not, public; it sheds light on matters that might be relevant to the Judicial Conduct and Disability norms; and it provides guidance to past, present, and future members of the Judicial Branch. It is therefore being posted to the Seventh Circuit's public website so that all interested persons can benefit from the Committee's advice.

Diane P. Wood
Chief Judge

COMMITTEE ON CODES OF CONDUCT
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES

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August 7, 2017

Honorable Diane P. Wood
Chief Judge
United States Court of Appeals for the Seventh Circuit
Everett McKinley Dirksen United States Courthouse
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Chicago, Illinois 60604

Re: Docket No. 2563

Dear Chief Judge Wood:

Thank you for your inquiry. The Committee on Codes of Conduct (the “Committee”) is pleased to respond. This response is advisory only and based solely on the judgment of the Committee members. Many of the proscriptions in the Code of Conduct for United States Judges (the “Code”) are cast in general terms, and the Code is “to be construed so it does not impinge on the essential independence of judges in making judicial decisions.” Commentary to Canon 1.

I.

You have requested a formal opinion on a problem that has arisen in your circuit, which problem concerns the responsibility of a judge to maintain the confidentiality of internal court documents, including documents that relate to the deliberative process. The types of documents you reference include bench

memoranda prepared for a panel of three appellate judges; draft opinions; oral or written materials from post-argument case conferences; and materials that appear only on the court's internal docket, as opposed to its public docket (whether because of sealing or other reasons to keep the information confidential).

More specifically, your inquiry states that an appellate judge in your circuit is in the process of completing a book on the institution of the Staff Attorney's Office in the federal courts of appeal. The book is expected to be published in the fall of this year, and you indicate that the authoring judge will be entitled to collect royalties. Your understanding is that the book will pay special attention to the Staff Attorney's Office in your circuit, but that it will also contain information about many of the other circuits' offices. You include in your inquiry a description of the book in question, which description was written by the authoring judge. You identify the following excerpt from the description and note your concern, in particular, with the italicized language:

The book contains very detailed critiques of a number of bench memos and draft orders by our current staff attorneys, who are in fact [a] mixed lot—some very good, some handicapped by not being able to write clearly. Neither peer review nor supervisory staff attorney review is adequate, and your decision on filling the supervisory staff attorney vacancies will be a critical one.

You state you have already informed the authoring judge that he is not at liberty to release internal, confidential court materials, such as the bench memoranda written to appellate panels by staff attorneys or the *draft* orders they prepared. In response, the authoring judge questioned what rule, if any, addresses what constitutes confidential court materials. Additionally, the authoring judge expressed to you his belief that post-argument court discussions should be made public. You note the authoring judge's view in that regard is not shared by any other judges on your circuit court. Thus, you state that your question is whether it is proper for one judge on a multi-member court (whether the court of appeals, or a three-judge district court, or a bankruptcy appellate panel, for example) to unilaterally publish pre-decisional documents submitted to a panel of the court.

II.

As a general matter, the Committee cannot respond to inquiries that ask questions about the conduct of other judges. It is typically the responsibility of each individual judge to make his or her own ethical decisions under the Code. However, in light of a chief judge's inherent supervisory and administrative authority, the Committee may respond to a chief judge's ethical questions about the proper action she may take regarding the processes and procedures pertaining to her circuit (or district or division within) as a whole. *See Private Opinion.*

Notably, while the Committee is authorized to provide advice to judges and judicial employees about their ethical responsibilities under applicable codes of conduct, the Code contemplates that chief judges may impose more stringent requirements on those individuals subject to their supervisory authority, as recognized in Canons 1 and 3. *See Private Opinion.* Canon 1 states that "judge[s] should *maintain and enforce* high standards of conduct," in addition to personally observing those same standards. (emphasis added). Canon 3 indicates that judges with supervisory authority have a responsibility to ensure that judges subject to their oversight perform their duties properly and observe appropriate standards of conduct. *See Private Opinion*; Canon 3A(3), 3B(4). Accordingly, the Committee's advice as to the propriety of a particular course of action does not preclude a court or a supervising judicial officer from imposing more specific or stringent requirements on judges of the court. *See Private Opinion.*

Thus, the Committee's response to your inquiry is intended to offer you advice under the Code regarding your supervisory and administrative role as Chief Judge in addressing the ethical implications of the conduct you describe in your letter. Additionally, to provide context to the Committee's advice to you, the Committee opines generally on the ethical issues that arise from the anticipated publication.

III.

As a threshold matter, the Committee concludes easily that the anticipated public disclosure of the confidential, internal court communications, about which you inquire, would violate the intent, letter, and spirit of the Code. The reasons for this conclusion are set forth below.

The most obvious express prohibition against the disclosures you describe is set forth in Canon 4D(5), which requires that “[a] judge should not disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge’s official duties.”¹ Here, the authoring judge’s intended use of the information, as set forth in your inquiry, is clearly “disclos[ure] [and] use of nonpublic information acquired in a judicial capacity for a[] purpose unrelated to the judge’s official duties.” *Id.* Thus, the Code expressly prohibits such use or disclosure.

In addition to Canon 4D(5)’s clear prohibition, the anticipated conduct you describe in your inquiry would implicate, at minimum, Canons 1, 2A, 2B, 3A, 3B, and 4G. Each of these Canons will be addressed in turn.

Canon 1 mandates judges to uphold the integrity of the judiciary. Specifically, “judge[s] should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved.” *Id.* The Commentary to Canon 1 states that violations of the Code “diminish[] public confidence in the judiciary and injure[] our system of government under the law.”²

Relatedly, Canon 2A provides that “[a] judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” The Commentary to Canon 2A provides that “[p]ublic confidence in the judiciary is eroded by irresponsible or improper conduct by judges,” and accordingly, “judge[s] must avoid all impropriety and appearance of impropriety” in both their professional and personal conduct. Of particular import, “[a]ctual improprieties under this standard include violations

¹ The Committee has effectively had no prior occasion to opine on conduct implicating Canon 4D(5). Candidly, the lack of opinions is likely reflective of the truth that Canon 4D(5)’s proscription is abundantly clear and, thus, no other judge has ever sought guidance from the Committee as to whether such disclosure of nonpublic information is ethically acceptable.

² Note that the type of “misconduct,” upon which a chief judge may identify a complaint under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-364, “is conduct occurring outside the performance of official duties if the conduct might have a prejudicial effect on the administration of the business of the courts, including a substantial and widespread lowering of public confidence in the courts among reasonable people.” Guide to Judiciary Policy, Vol. 2E, Ch. 3 § 320, art. I(3)(h)(2).

of law, *court rules*, or other *specific provisions of this Code*.” *Id.* (emphasis added).³

Furthermore, the Committee has repeatedly observed that “[f]or a judge to derive financial benefit, over and above the judicial salary, from the publication and sale of a book about his or her own court . . . would constitute exploiting the judicial position for financial gain,” Advisory Op. No. 87, in contravention of Canon 2B, which bars a judge from lending the “prestige of the judicial office to advance the private interests of the judge.” Even if the judge does not accept royalties for this book, the Committee has advised that the publication and sale of a judge’s book about the judge’s own court could permit others, such as a publisher, “to benefit from the judge’s exploitation of his or her judicial position.” Advisory Op. No. 87; *see* Private Opinions. As the Committee has stated, “it is inappropriate for a judge to sell his expertise about the idiosyncrasies of practice before the judge’s own court.” Private Opinion (citing Advisory Op. No. 87). While the proposed book will apparently discuss Staff Attorney Offices in other circuits, the book will pay special attention to the Staff Attorney’s Office within the authoring judge’s circuit, and the Committee has instructed that a judicial author should “confirm that the content is not presented in a way that exploits [his] judicial position (*e.g.*, by suggesting that the book represents a judicial perspective).” Private Opinion. Moreover, the Committee has found that “[t]he duty of a judge to promote public confidence in the integrity and impartiality of the judiciary may be at risk when a judge voluntarily injects him or herself into the limelight of public controversy or discussions of sensitive matters, including confidential aspects of the judicial process.” Advisory Op. No. 114.

With regard to the authoring judge’s possible inclusion of denigrating comments about employees of your Staff Attorney’s Office, Canon 3A(3) states that “[a] judge should be patient, dignified, *respectful*, and courteous *to* litigants, jurors, witnesses, lawyers, and *others with whom the judge deals in an official capacity*.” (emphasis added). Relevant to your capacity as Chief Judge, Canon 3A(3) further states that “[a] judge should require similar conduct of those subject to the judge’s control.”⁴ In addition, the authoring judge’s denigrating comments about members of the Staff Attorney’s Office, if disseminated in any capacity, will undoubtedly

³ “Where court rules impose a confidentiality requirement, a judge should not issue a public statement that would breach confidentiality.” Compendium § 1.2(e).

⁴ *See infra* note 6.

cause significant harm to morale, which in turn could impact the current and future efficient functioning of that office and the court. Thus, addressing the inclusion of these comments falls squarely within the Chief Judge’s supervisory role under Canon 3B(4) of the Code, which states that “[a] judge with supervisory authority over other judges should take reasonable measures to ensure that they perform their duties timely and effectively.”

Next, to the extent the authoring judge either intends to disclose information regarding matters pending or impending in your court, or advocates for disclosure of post-argument discussions, Canon 3A(6) is implicated. Specifically, Canon 3A(6) admonishes that “[a] judge should not make public comment on the merits of a matter pending or impending in any court,” which admonition continues through the appellate process. Commentary to Canon 3A(6). Notably, “Canon 3A(6) does not bar comment in final, completed cases, *so long as judges refrain from revealing deliberative processes* and do not place in question their impartiality in similar future cases.” Compendium § 3.9-1(d) (emphasis added).

Moreover, the authoring judge’s intended use of the information—which, at the time of disclosure, was presumed to be confidential—may leave the judges in your circuit hesitant to openly engage in future discussions. In that regard, “reasonable measures to ensure that [judges are able to] perform their duties timely and effectively” may be warranted. Canon 3B(4). Accordingly, the Committee advises that, as the Chief Judge of your circuit, and particularly in light of the concern expressed by other judges of the circuit, you consider imposing clearly defined limitations on the type of information that the authoring judge is permitted to disclose. By way of example, in an effort to “maintain and enforce high standards of conduct,” Canon 1, you may choose to establish local rules to clearly define what constitutes “confidential” material in your court, as well as limitations on the disclosure of confidential or internal court materials and discussions. You might also consider adopting a local rule, requiring judges to obtain the chief judge’s final approval before submitting any extrajudicial writings for publication, analogous to the rule requiring the chief judge’s approval for a judge to teach for compensation. *See* Guide to Judiciary Policy, Vol. 2C, Ch. 10 § 1020.35(c); Compendium § 1.2(e).⁵

⁵ *See supra* note 3 and accompanying text.

Finally, while Canon 4 permits and even encourages judges to engage in certain extrajudicial activities, it provides that “a judge should not participate in extrajudicial activities that detract from the dignity of the judge’s office, interfere with the performance of the judge’s official duties, reflect adversely on the judge’s impartiality, lead to frequent disqualification, or violate the limitations set forth [in Canon 4].” *See also* Canon 3 (“The duties of judicial office take precedence over all other activities.”). Here, beyond Canon 4D(5)’s prohibition on the disclosure or use of nonpublic information, addressed at the inception of this discussion, the described conduct may also implicate Canon 4G, which states that “[a] judge should not to any substantial degree use judicial chambers, resources, or staff to engage in extrajudicial activities permitted by this Canon.” In conducting the thorough research for his book, the authoring judge may well have imposed upon court staff with inquiries regarding how their offices function, thereby potentially taking time away from their work. This imposition and distraction can reasonably be construed as an impermissible use of court resources and staff to engage in extrajudicial activities.⁶

IV.

In closing, the Committee reiterates that the anticipated public disclosure of confidential, internal court communications violates the intent, letter, and spirit of the Code of Conduct for United States Judges.

The Committee treats all inquiries and responses as confidential and will disclose information about them only in the narrow circumstances described in the Committee’s confidentiality policy. *See* Guide to Judiciary Policy, Vol. 2B, Ch.1 § 130. As the recipient of this letter, you may use it as you please.

⁶ The Committee also notes that the disclosure of confidential information by court employees is prohibited under Canon 3D of the Code of Conduct for Judicial Employees, and, under the Code of Conduct for United States Judges, “[a] judge should not direct court personnel to engage in conduct on the judge’s behalf or as the judge’s representative when that conduct would contravene the Code if undertaken by the judge.” Canon 3B(2).

We hope this response has been helpful. If you have any further questions, please call or write.

For the Committee,

Rebecca Beach Smith
Chair